FILED

97 1237 DEC 10 1997

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

October Term 1997

**LOCAL UNION 7107,
UNITED MINE WORKERS
OF AMERICA, DISTRICT 28,**

Petitioners,

v.

CLINCHFIELD COAL COMPANY,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Petition for Writ of Certiorari

Sue Ella E. Kobak
Counsel of Record
Sue Ella E. Kobak, P.C.
P.O. Box 428
Pennington Gap, Virginia 24277
(540) 546-3642

Counsel for Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

QUESTION PRESENTED FOR REVIEW

I. WHAT PROOF IS REQUIRED FOR SUMMARY JUDGMENT IN FAVOR OF AN EMPLOYER, WHO RELIES SOLELY UPON THE DEFENSE OF 29 U.S.C. Sect. 2102(b)(2)(A) TO AVOID LIABILITY FOR FAILURE TO GIVE SIXTY DAYS' NOTICE PURSUANT TO THE WARN ACT?

PARTIES TO THE PROCEEDING

Petitioner is United Mine Workers of America, District 28, Local Union 7107, Plaintiff below. Petitioner is an unincorporated association, i.e., a labor union. Respondent is Clinchfield Coal Company, Inc., Defendant below. Respondent is a wholly owned subsidiary of Pittston Coal Co.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTES AND REGULATIONS RELIED UPON 1

STATEMENT OF THE CASE 3

"Sudden, Dramatic and Unexpected" 7

Commercial Reasonableness 7

Disputed Facts 8

REASONS FOR GRANTING THE PETITION 9

JURISDICTION OF
THE UNITED STATES DISTRICT COURT 10

TABLE OF CITATIONS

CASES:

Chestnut v. Stone Forest Industries, Inc.,
817 F. Supp. 932 (N.D.Fla. 1993) 8

Intern. Ass'n of Machinists v. General Dynamics,
821 F. Supp. 1306 E.D. Mo. 1993) 8

Jones v. Kayser-Roth Hosiery,
748 F. Supp. 1276 (E.D. Tenn. 1990) 8

STATUTES AND RULES:

28 U.S.C. Sect. 1254(1) 1

29 U.S.C. Sect. 2102 1

Sect. 2102(b)(2)(A) 1, 3

Sect. 2102 (b)(3) 2

29 U.S.C. Sect. 2104 10

20 CFR Sect 639.9(b)
(Amended 4/1/96) 1990) 2, 3

WARN Act .....*passim*

PETITION FOR WRIT OF CERTIORARI

United Mine Workers of America, District 28, Local Union 7107, respectfully petitions the United States Supreme Court to issue a Writ of Certiorari to review the judgment entered in this action by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit giving rise to this petition is a published opinion , 1977 U.S. App. Lexis 23842, reprinted at App. 1 through App. 9. The opinion of the United States District Court for the Western District of Virginia, Big Stone Gap Division is an unpublished opinion and is reprinted at App. 10 through App. 18 .

JURISDICTIONAL STATEMENT

Jurisdiction lies with this Court pursuant to 28 U.S.C. Sect. 1254(1).

Judgment was entered in the United States Court of Appeals for the Fourth Circuit on September 11, 1997. No petition for rehearing was filed.

STATUTES AND REGULATIONS RELIED UPON

29 U.S.C. Sect. 2102.

Notice required before plant closings and mass layoffs.

(b)(2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably

foreseeable as of the time that notice would have been required.
(b)(3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

20 CFR Sect. 639.9(b)(as amended 4/1/96):

The "unforeseeable business circumstances" exception under section 3(b)(2)(A) of WARN applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.

(1) An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.

(2) The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately

predict general economic conditions that also may affect demand for its products or services.

STATEMENT OF THE CASE

Petitioner seeks review of the decision of the United States Court of Appeals for the Fourth Circuit affirming the United States District Court's granting of Respondent's motion for summary judgment.

On January 28, 1994, Clinchfield Coal Co., respondent herein, gave notice to the employees of Splashdam Mine that the mine was shutting down, effective the next day. For some employees this constituted no notice; others were laid off over the following several weeks to one month.

Respondent does not challenge that it is an employer required to give 60 days' notice prior to a plant closing/mass layoff, as required by the WARN Act. Rather, it relies upon the affirmative defense of 29 U.S.C. Sect. 2102(b)(2)(A) allowing reduced notice when the layoff or closing is caused by business circumstances which are not reasonably foreseeable.

20 CFR Sect. 639.9(b)(2) amplifies the requirements to be met by an employer seeking the protection of the "unforeseeable business circumstance" exception to the notice requirements of the WARN Act. Specifically, the circumstance must be sudden, dramatic and unexpected; further, the employer must be found to have exercised such commercially reasonable business judgment as would a similarly situated employer. Finally, the employer must still give such notice as is practicable.

For thirty years, Dofasco, a Canadian corporation, was a customer of Clinchfield Coal Co., purchasing what is referred to as "McClure B" coal. Dofasco was the sole customer for coal produced by the Splashdam mine, which contributed the largest part to the McClure B blend. Beginning with the 1993 contract, Dofasco required

additional quality control of Clinchfield; Clinchfield was paid an extra $.05 per ton to perform additional testing. This emphasis apparently caused some concern to Respondent. See Memoranda dated December 16, 1992, December 21, 1992, January 19, 1993 and March 18, 1993.

Nevertheless, Clinchfield Coal Co. was unable or unwilling to meet the standards required by Dofasco. Repeatedly throughout the course of the 1993 contract term, Dofasco complained to Clinchfield about the various problems it was experiencing with the coal supplied by Clinchfield. See letter to S. F. Bartle dated July 2, 1993; letter of September 2, 1993 to George Denton; September 30, 1993 notes of meeting with Dofasco; notes of meeting October 27 with Dofasco; memo to file concerning meeting with Dofasco dated October 20, 1993; notes of meeting of December 15, 1993 with Dofasco; memo dated January 14, 1994 from J. P. McEnaney; and memo dated March 2, 1994 from D. L. Lau.

In the notes of September 30, 1993, Clinchfield is again reminded that Dofasco wants analyses prior to the arrival of the boat containing the coal. This is precisely what Dofasco indicated it needed at the outset of this contract, but Clinchfield apparently ignored this request.

Dofasco also complains on September 30, 1993 about the variance and reflectance of Clinchfield's coal; finally Dofasco complains about CSR value.

The notes of the October 27 meeting between Dofasco and Clinchfield indicate that Dofasco is disappointed in the control aspects of front line people in prep plants, that others have better procedures, and again, that Dofasco wants more statistical analysis. Even Clinchfield's own internal memo from D. L. Lau references the variability problem: Mr. Lau notes that "Pittston needs the discipline to do the process documentation."

Clinchfield repeatedly ignores the complaints of Dofasco. Indeed, according to the deposition of Thomas Tabacchi, Executive Vice President of Pittston Coal Sales

Corp., he was not even advised by the sales staff negotiating the future contract for Clinchfield that Dofasco had any complaints about Clinchfield's coal other than its CSR value. Specifically, he was unaware that Dofasco complained that other suppliers had better front line controls, he was unaware that Dofasco complained about Pittston's written procedures, he was unaware that Dofasco complained about a lack of proper statistical analyses, he was unaware of Dofasco's concerns about damage to its blast furnaces, and he was unaware that Dofasco was concerned about McClure B having too high a volatility. Depo. at 5-8. He further states that had anyone taken the time to advise him of the problems, he would have attempted to solve them. Depo. at 5-8. The only action taken in response to complaints was by George Denton, who simply prepared tables to show Dofasco that it was wrong about the CSR (see McEnaney affidavit). Thus, not only did Clinchfield fail to even attempt to correct any of the problems voiced by Dofasco, it argued with Dofasco.

On December 15, 1993, following the repeated and unaddressed complaints set forth above, Dofasco dropped a bombshell on the Pittston Sales Group staff. In the hand-written notes of Don Lau, Clinchfield representative, the variability problem is addressed. The notes further reflect that "McClure is worst high vol. coal in the plant. Operators don't want to use it--it gives lowest CSR relative to the other high vols. used. . . Ash chemistry in McClure is the driving force on CSR according to Dofasco Research, McClure has too much basicity (Iron is high) . . . Purchasing is getting heat for using McClure. They want Pittston to try to help improve CSR to keep us in the blend. . . . Dofasco prefers CSX coal--will look at NS [Norfolk Southern Railway].

Of crucial importance is the note that "in 1994 the maximum tonnage purchased will be 200,000 tons if the CSR improved. This is less than one-half of that purchased in 1993."

Clinchfield, through the deposition of James Campbell, Senior Vice President of Operations, admits that there is nothing it could do about the CSR problem. Depo. of Campbell at 8.

On January 14, 1994, nearly one month following the December 13, 1994 meeting, Joseph P. McEnaney sends a memo to "distribution" concerning the Dofasco contract, which states as follows:

> Our current and future position with Dofasco is in serious jeopardy. We have already been advised that the maximum tonnage we can hope for in 1994 will be on the order of 200,000 MT of the McClure B coal, down from last year's level of 435,000 tons. The reason for the reduction is the inability of our coal to produce satisfactory CSR results in their coke blends. This issue has been brought to our attention regularly over the last six months by Dofasco and absent our ability to resolve the problem, they have opted to go with another supplier. The tonnage which Dofasco has left open for us is not secure as yet. Dofasco still awaits our plan to improve that quality, which can only be achieved by reconfiguring the raw coal blend, and receive assurances that Pittston is at least expending its best efforts in this area. In addition to quality improvement, we will also be obliged to take a price reduction as we remain the highest priced coal in their blend.

Following this memo, no reconfiguration of the raw blend occurred, and no assurances were provided to Dofasco that Clinchfield was expending its best efforts.

On January 24, 1994, Dofasco offered Clinchfield $32.50 per ton of coal. This was better than what it had indicated--Dofasco had stated in December that unless CSR was improved, there would be no purchase whatsoever. Clinchfield rejected this offer and finally gave "notice" to its employees on January 28, 1994.

Clinchfield admits the above facts; indeed the facts are adduced exclusively from its own documents and deposition testimony. Clinchfield simply asserts that it didn't believe Dofasco, it believed that Dofasco was "posturing".

"Sudden, Dramatic and Unexpected:"

Dofasco's dissatisfaction with Clinchfield was certainly not sudden. Rather, Dofasco offered more to Clinchfield than it advised as early as December of 1993 that it would--in December, it advised that unless the CSR was improved there would be no purchase at any price. The CSR was not improved, and, per James Campbell, could not be improved.

The drop in coal price may be dramatic. The record indicates that Pittston expected a drop of $1.00 per ton; yet there is no documentation of this belief, nor is there market data to support it.

Commercial Reasonableness:

Quite simply there is no objective evidence whatsoever of commercial reasonableness. All affidavits address the personal beliefs of individual Clinchfield employees/management toward the Dofasco contract negotiating process. This not only doesn't satisfy the requirement of objective commercial reasonableness, it

ignores it. Further, the affidavits submitted wherein Thomas Tabacchi and others claim that they didn't realize there were problems are premised upon the failure of their sales staff to apprise them of the numerous and varied complaints of Dofasco. Thus, their beliefs were premised on lack of knowledge.

Disputed Facts:

Surely a reasonable factfinder could find that it is not commercially reasonable to continuously ignore the complaints of your best customer, to refuse to believe everything that customer advises you, to issue a memo indicating that a contract is in jeopardy unless certain problems are corrected and then fail to attempt to correct those problems, etc.

Several courts have considered terminations of contracts and found the actions to be commercially reasonable. Yet all of these courts have done so following a trial on the merits and often testimony from others in the industry in reaching their conclusions. See, e.g. Jones v. Kayser-Roth Hosiery, 748 F. Supp. 1276 (E.D. Tenn. 1990); Chestnut v. Stone Forest Industries, Inc., 817 F. Supp. 932 (N.D. Fla. 1993); Intern. Ass'n of Machinists v. General Dynamics, 821 F. Supp. 1306 (E.D. Mo. 1993). The analysis of the United States Court of Appeals for the Fourth Circuit lies largely in accepting the belief of Pittston that the contract would be renewed. Petitioner does not contest Pittston's belief; however, the standard to be applied is objective, not subjective. Pittston presents no evidence from any similarly situated business person.

REASONS FOR GRANTING THE WRIT

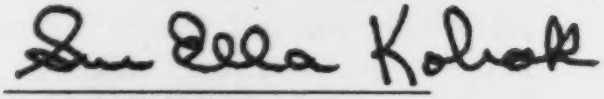
1. 1. This Court has never addressed the requirements of the unforeseen business circumstance affirmative defense to the WARN Act. Given its potential for use in every adversarial market condition, this defense is of major import in WARN Act litigation. Allowing an employer to prevail upon its summary judgment motion simply by stating "we didn't believe that they would do what they said they would do", coupled with a record devoid of evidence of objective commercial reasonableness of the employer's actions, guts the WARN Act and flies in the face of the regulations interpreting it. This result creates an important question of federal law.

There is not yet a conflict between the Circuits since no other case with similar facts has been resolved by summary judgment. In several cases, summary judgment has been denied by the United States District Court. However, if Pittston may succeed by summary judgment a conflict is inevitable since certainly some courts of appeal will require that the requirements of the regulations be met.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

Jurisdiction with the United States District Court, the Court of first instance, laid pursuant to 29 U.S.C. Sect. 2104, et seq.

For the foregoing reasons, Petitioner respectfully requests this Court to grant its petition for certiorari.



Sue Ella E. Kobak
Counsel for Petitioner
Post Office Box 428
Pennington Gap, VA 24277